

# ARKANSAS SUPREME COURT

No. 06-953

DAVID KELLY  
Appellant

v.

LARRY NORRIS, DIRECTOR,  
ARKANSAS DEPARTMENT OF  
CORRECTION  
Appellee

Opinion Delivered May 31, 2007

APPEAL FROM THE CIRCUIT COURT  
OF JACKSON COUNTY, CV 2006-55,  
HON. HAROLD S. ERWIN, JUDGE

APPEAL DISMISSED.

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## PER CURIAM

On November 9, 1998, appellant David Kelly entered a guilty plea in Lawrence County Circuit Court to one count of incest and was sentenced to twenty-five years' imprisonment in the Department of Correction. As a part of the plea agreement, the State moved during the hearing to nol-pros a count of rape of a child of less than thirteen, a count of rape by force, and a count of third-degree battery. Appellant, represented by counsel, then filed a petition for writ of habeas corpus, which resulted in a writ of habeas corpus being issued in the county in which he was then incarcerated. The order granting the writ in Jefferson County Circuit Court provided that the writ should issue unless the trial court reduced appellant's sentence to ten years' imprisonment, or the petitioner's guilty plea was set aside, allowing the prosecuting attorney to refile the original charges.

The trial court in Lawrence County, on February 15, 2001, issued a writ of *habeas corpus ad prosequendum* to produce appellant for a new trial and, on February 16, 2001, the prosecuting attorney

filed a new information charging appellant with incest, third-degree battery, and two counts of rape. A judgment and commitment order entered August 21, 2001, reflects that a jury convicted appellant on two counts of rape, incest (with a notation that this charge was vacated on double-jeopardy grounds), and battery in the third degree. He was sentenced by the jury to twenty years' imprisonment for each of the rape charges, and one year of imprisonment for the battery charge, all to run concurrently.

Appellant appealed the new conviction, and this court affirmed. *Kelly v. State*, 350 Ark. 238, 85 S.W3d 893 (2002). Appellant next filed a pro se petition for writ of habeas corpus in Jefferson County Circuit Court, where he was, at that time, incarcerated, and the writ was denied. Appellant brought an appeal of that order and we affirmed. *Kelly v. Norris*, CR 03-1295 (Ark. Apr.28, 2005) (per curiam). In that petition and appeal, appellant had argued that the trial court lacked jurisdiction to retry him because he had only sought resentencing in his original habeas corpus petition and the prosecuting attorney should not have been permitted to refile all the original charges.

Appellant was incarcerated in Jackson County when he filed a new pro se petition for writ of habeas corpus in Jackson County Circuit Court, arguing much the same points as raised in his previous unsuccessful pro se petition in Jefferson County Circuit Court. That petition was denied, and appellant, again represented by counsel, now brings this appeal of that order.

At some point after his petition was filed, appellant was transferred, as he is no longer incarcerated in Jackson County. We take notice that the records of the Department of Correction show that appellant is now incarcerated in Hot Spring County. This change in circumstances necessitates dismissal of the appeal.

A circuit court does not have jurisdiction to release on a writ of habeas corpus a prisoner not in custody in that court's jurisdiction. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam) (citing *Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991)). While Jackson County

Circuit Court may have had personal jurisdiction to issue and make returnable to the court a writ of habeas corpus when the petition was filed, it does not have personal jurisdiction to release a petitioner who is held in another county. *See Lukach v. State*, \_\_\_\_ Ark. \_\_\_\_, \_\_\_\_ S.W.3d \_\_\_\_ (Apr. 26, 2007) (per curiam). As the circuit court cannot provide the requested relief, we must dismiss the appeal and do not reach the merits of the issues raised by appellant.

Appeal dismissed.